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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-509

THE SINGER COMPANY,

Petitioner,

v.

PERMA RESEARCH & DEVELOPMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF SCM CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF SCM CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SCM Corporation respectfully moves this court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein refused to consent to the filing of a brief by SCM Corporation as *amicus curiae*.

Applicant's interest in the issues presented by this action is described on pages 1-2 of the accompanying brief.

Petitioner The Singer Company has asked this Court to address the issue of whether the computer-generated materials were properly considered by the trial court. SCM believes that error and others make the decision below a particularly bad commercial law precedent.

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BRIEF OF SCM CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Interest of the *Amicus Curiae*

SCM Corporation ("SCM") is a diversified manufacturing company with principal offices in New York. On the appeal below, over the objection of plantiff-respondent Perma Research & Development Company ("Perma"), the Court of Appeals accepted the *amicus* brief of SCM in support of the appeal of defendant-petitioner, The Singer Company ("Singer").

This case is of widespread interest to the commercial-legal world,* and of deep concern to SCM. A company, such as SCM, which is constantly endeavoring to develop new commercially successful products is necessarily affected by a decision in which, as here, the court goes far beyond the parties' negotiated written contract to impose an unexpressed obligation upon a manufacturer engaged in the high-risk venture of bringing an untried new

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* In a two-day Practising Law Institute course on significant new trends in licensing, given in both San Francisco and New York, half of one afternoon's session was scheduled specifically for a discussion of the district court opinion in this case. 12 PLI News No. 104, Dec. 31, 1975.

product to market. SCM's concern increases when that postulated obligation becomes the source of open-ended liability for $7 million in damages that are based upon computer simulations whose foundation is allowed to remain secret and therefore untested.

Reasons for Granting the Writ

Judge Van Graafeiland, the only member of the panel with recent experience as a practicing attorney, was "convinced that both the decision [of the district court] and the manner in which it was reached were clearly erroneous" (App. J, p. 139a). SCM submits that a careful and disinterested reading of Mr. Justice Clark's majority opinion and of Judge Van Graafeiland's dissenting opinion can lead only to the distressing conclusion that the majority opinion is similarly deficient in both conclusion and method, resulting in "a clear miscarriage of justice" (App. J., p. 147a).

Even a casual reader must be struck by the contrast between the detailed specific record references in the dissent and the cursory generalized conclusions in the majority opinion. By ignoring basic specific points raised by Judge Van Graafeiland, the majority invites the world to believe that the facts in the dissent are correct but nevertheless justify the ultimate conclusion that Singer is liable. SCM finds it impossible to entertain such a belief. Because of this factual detail in the dissent, the decision below will become even more significant as a precedent. Standing alone the majority opinion might possibly come to be regarded as merely a cryptic affirmance of the factual conclusions of the district judge, based upon a record disclosed only insofar as the district court chose to do so in support of its decision (now officially reported); but by displaying some of the undisputed evidence (quoting from documents and from plaintiff's own statements) the dissent makes it possible to compare quite closely the evidence in this case to the evidence in future cases.

Beyond the particular injustice, the Second Circuit's decision may well have an inhibiting effect on the commercial development of new products, for the risks of dealing with the independent inventor are no longer to be measured by the wording of the contract. And, in an even broader perspective, the decision is unsettling to the commercial world because it undermines general confidence in the courts' ability to deal reasonably and fairly with commercial disputes and thereby adds an element of unpredictability, of randomness, to every important contract on which businessmen rely in the ordinary course of their commercial life.

The majority accomplished these results, at least in part, through questionable judicial techniques. A significant illustration of the approach used by the majority can be seen in the way it dealt with the point which petitioner Singer wishes this Court to decide. The section of the majority opinion that rejected Singer's claim that it was deprived of its right to meaningful cross-examination of hearsay computer evidence cites *no* authority whatever, much less the recent decision by the same court which was, at the very least, in point, and the apparent controlling authority to the contrary, *viz.*, *United States* v. *Dioguardi*, 428 F. 2d 1033 (2d Cir.), *cert. denied*, 400 U. S. 825 (1970). (App. J., pp. 135a-37a). Llewellyn describes this "disregard of a case in point without mentioning it" as an "illegitimate" appellate judicial technique. K. Llewellyn, *The Common Law Tradition: Deciding Appeals*, 133 (1960). In his discussion of that kind of judicial procedure, Llewellyn states:

> "Nonetheless, and conceding the best of intentions, the cost of such procedure is excessive, it is exorbitant. To deliberately leave undealt with, unmentioned, an essentially contrary authority is to inflict upon the bar and the trial and other hierarchically lower bench unresolvable uncertainty where the duty is to give best available guidance. Who can tell whether the omission was intentional? Even if it should be suspected to be intentional, who knows whether the ghost will rise and walk? To duck and deliberately obscure the question is irresponsible judging." *Id.* at 134.

One may well ask why the majority used the cursory approach it did, showing so little concern for considerations of legitimacy of appellate decision in establishing this largely un-

explained commercial law precedent in a case which had already attracted significant attention. SCM regretfully submits that the majority decision was improperly affected by a desire to end the litigation easily. How else can one account for the following statement from the preliminary part of the majority opinion?

> "The ten-year, tortuous course of this litigation has involved five different trial judges and is here now for the second time, *and still Singer insists* that the December 18, 1964 contract does not impose upon it the obligation to perfect the anti-skid device it obtained from Perma, or if it does, that the abandonment of the contract was justifiable* on the ground that the anti-skid device was not sufficiently perfectible to satisfy Singer's standard of 'absolute fail-safety.' "** (App. J., p. 133a; emphasis supplied)

The implication that Singer's argument ought not even to have been advanced is unjustified and unseemly. Neither argument had been rejected previously by the Court of Appeals. Quite properly, Singer vigorously contested a judicially imposed *implied* obligation that plaintiff had not even asserted in its complaint (see dissent, App. J., pp. 145a-46a).

It is with respect to this claim of an implied obligation in contracts involving patents that the majority opinion will prove most troublesome as a precedent to manufacturers like SCM. The majority opinion begins by announcing that Singer's argument merits short shrift.

> "We need not belabor the point that Singer was obligated under the December 1964 contract to use its best efforts to perfect the anti-skid device covered by the

* Singer did not argue that abandonment of the *contract* was justifiable; rather Singer argued that the contract itself permitted Singer to decide that it need not continue to invest enormous sums in trying to create a device that did not exist. Singer did discontinue work on the *product* after losing well over $1 million in trying to make the venture succeed (dissent, App. J., pp. 148a-49a).

** The "absolute fail safety" standard is the court's construction. Singer's standard was that the product should not "leave the purchaser . . . less safe that if it hadn't elected to purchase it," a standard which, as the dissent states, "warranted approbation, not the ridicule accorded it by the District Judge." (dissent, App. J., pp. 155a-56a).

> Perma patents that were assigned to it." (App. J., p. 133a).

Although the majority then goes on to describe certain presumably significant facts peculiar to the Singer-Perma relationship, nowhere does it contradict any of the wealth of evidence and legal analysis contained in the dissent's treatment of this issue (App. J., pp. 139a-50a). There is nothing in the majority opinion (or in the district court decision) contradicting the dissent's description of the fundamental events: a detailed contract reached as a result of skilled negotiations, explicitly embodying the parties' entire agreement, and formal, repeated statements by plaintiff that negated the obligation whose existence the majority "need not belabor." So far as appears in any of the judicial opinions, all the factual statements in the following quotation from Judge Van Graafeiland are correct; the only difference is over the conclusion.

> "With the execution of the contract herein, defendant had approximately two million dollars invested in a device which, despite plaintiff's representations to the contrary, was unmarketable and dangerous. Implication of an obligation to perfect this device, in direct contravention of the terms of the written agreement, exacerbates, rather than rectifies, an injustice." (App. J., p. 149a)

The opinions below create confusion even with respect to the manner in which the implied obligation can be proved. According to Judge Van Graafeiland, the District Court tried the case after having, *sub silentio*, granted a partial summary judgment* in favor of Perma by postulating a Singer obligation based on an asserted intention of the parties unfounded in fact, and then denying Singer the right to adduce any evidence with respect to

* Although the majority expresses concern about the duration of litigation, it is the dissent's analysis which would result in true long-term judicial economy. If the businessmen's written agreement and Perma's formal pleadings are treated seriously, then Singer's pre-trial motions for summary judgment are correct and should have been granted. It is, after all, the purpose of both formal written contracts and Rule 56, F.R. Civ. P., to eliminate the need for protracted investigations of complex but essentially irrelevant events.

such intent, so that "the battle was half over although not a single shot had been fired." (dissent, App. J., p. 140a). Although the majority appears to take a different view of the scope of evidence permitted by the district court (App. J., p. 133a), it refers only to the district court's own description of its conduct in the district court opinion; it makes no reference to the record itself. Consequently, once more the dissent's detailed references and quotations (App. J., pp. 140a-42a) are unrefuted, thereby leaving very much in doubt the role of the pre-trial order and the latitude permitted to the trial court.

Collectively, of course, these examples show how the decision below will undermine confidence that, on appeal, conclusions of fact will truly be tested against the undisputed evidence in the record.

Conclusion

Not only does this case present an important question of evidence, as Singer explains, but it does so in the context of a decision that will be seen as unjust and inexplicable, and which has already attracted the attention of practitioners across the country. In contrast with Judge Van Graafeiland's careful and explicit attention to the record, to the rules of evidence and to applicable precedents, the majority, in an apparent overriding concern that this lengthy litigation be ended, has foregone the traditional "passive virtues" which underlie legitimacy in judicial actions. Accordingly, certiorari should be granted.

Respectfully submitted,

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